LAW REFORM
COMMISSION
OF
NOVA SCOTIA

Vexatious Litigants

Discussion Paper - December 2005

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VEXATIOUS LITIGANTS

Law Reform Commission of Nova Scotia
December 2005

WHAT DO YOU THINK?

The Law Reform Commission is very interested in what you think about the issues raised in the Discussion Paper, ***Vexatious Litigants***.

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law should deal with vexatious litigants.

If you would like to comment on the Discussion Paper, you may:

- Fax the Commission at (902) 423-0222
- Send an e-mail to info@lawreform.ns.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the following address:

  Law Reform Commission of Nova Scotia
  2nd Floor, 1484 Carlton Street
  Halifax, Nova Scotia
  B3H 3B7

In order for us to fully consider your comments before we prepare our Final Report, please contact us by February 13, 2006.

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act* to *Establish an Independent Law Reform Commission.*

The Commissioners are:

Keith R. Evans, President
Anthony Chapman, Q.C.
Thomas A. Cromwell
Diana E. Ginn
Darlene A. Jamieson
E. Arleen Paris

John E.S. Briggs,
Executive Director and General Counsel.

William H. Laurence,
Legal Research Counsel.

Mary Bowen,
Administrative Assistant.

The Commission offices are located at:

Law Reform Commission of Nova Scotia
1484 Carlton Street
Halifax, Nova Scotia B3H 3B7

Telephone: (902) 423-2633
FAX: (902) 423-0222
Email: info@lawreform.ns.ca
Web Site: www.lawreform.ns.ca.

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SUMMARY

Vexatious litigants persistently and habitually engage in legal proceedings, without having a legitimate claim requiring resolution. The vexatious litigant may sue in order to annoy, harass, or financially punish other people.

Vexatious litigants can strain court resources. They can waste the time of judges and administrative staff and prevent other, legitimate claims from being dealt with. They can also force other people to incur otherwise unnecessary legal bills.

The Law Reform Commission is of the view that vexatious litigants can pose a serious problem for Nova Scotia's civil justice system.

Taking into account the need to ensure access to the courts for all, as well as to prevent the abuse of the courts' process and the waste of time and money, the Commission suggests the adoption of a vexatious litigants statute in Nova Scotia. The statute would explicitly empower the courts to make an order against a vexatious litigant. The order would preclude a vexatious litigant from starting any new actions or continuing with an existing action until court leave was granted to lift the order. A balanced approach would be used, one which empowers the courts to deal effectively with vexatious litigants, but which also permits someone subject to a court order to seek court leave to have the order lifted when circumstances change.

Among others, this Discussion Paper also proposes:

- The vexatious litigants statute should apply to all Nova Scotian courts with civil jurisdiction. It would be cumulative in relation to other remedies and would not derogate from the courts' current powers.

- Rather than attempting to define the term "vexatious" or to use a substitute, a vexatious litigants provision could include a non-exclusive list of factors which could help to guide the court. Another possibility would be to adopt precise, numerical criteria in order to decide who is a vexatious litigant.

- A vexatious litigant provision should require notice to be provided to the Attorney General of an application for a vexatious litigant order. The Attorney General would be entitled to appear at the hearing of the application. The statute should make it clear that unless applying for a vexatious litigant order, the Attorney General's role would not be a partisan one.

- One should be able to appeal a vexatious litigant order. One should not, however, be able to appeal an unsuccessful leave application to have a vexatious litigant order lifted.

- Courts should be given an express rule-making power to determine how a leave application should take place, including any limits on the frequency of such applications.

- A vexatious litigant statute should specifically and clearly permit courts to deal with both new and continuing proceedings.

- The language used in a vexatious litigant statute should include vexatious spokespersons or agents.

The Commission has also identified a number of issues for which it requires more information before taking a position. Specifically, the Commission invites comments on whether a vexatious litigants statute should apply to the Small Claims Court, what approach to defining a vexatious litigant would work best, and whether any additional measures would be suitable to prevent further abuses of process by a vexatious litigant seeking to have an order lifted.

The Commission welcomes comments on any aspect of this Discussion Paper and will take comments received into account when deciding on final recommendations for reform.

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DISCUSSION PAPER
VEXATIOUS LITIGATION

I. Introduction

Access to justice issues are often in the news. We read that many Canadians cannot afford legal representation in civil litigation.[1] Most Canadians are also not able to obtain services from a provincial legal aid plan, because of eligibility requirements.[2] Without money to pay for a lawyer and without access to legal aid services, many Canadians choose to represent themselves in legal actions.[3]

We also read about delays in the civil justice system.[4] Some of those delays can be attributed to the involvement of self-represented litigants, who act for themselves in legal proceedings, without the assistance of a lawyer. Being unfamiliar with court procedures and the law, self-represented litigants take up more time to comply with procedures, prepare required documents, and present a case in court than would a trained lawyer.[5] Judges often must

[1] See, for example, Cassandra Szklarski, "Don't Try This at Home..." *[St. John's] Telegram* (15 June 2003), A11. (ProQuest); Brian Flemming, "Work of Law Reform Commission Must Go On" *[Halifax] Daily News* (9 July 2003), 20. (ProQuest). This Discussion Paper is exclusively about private law disputes and does not involve criminal law matters.

[2] Szklarski, note 1, above; Flemming, note 1, above.

[3] Szklarski, note 1, above; Flemming, note 1, above; Tracey Tyler, "Lawyers Urged to Do Free Work" *Toronto Star* (1 August 2004), A07. (ProQuest); Wendy-Anne Thompson, "Lawyerless Litigants Clog Courts" *Calgary Herald* (16 January 2002), B1. (ProQuest); Kirk Makin, "Lawyerless Litigants Slow Wheels of Justice" *The Globe and Mail* (14 January 2002), A1; "Arming Self-represented Litigants with Relevant Law," *The Society Record* (February 2005), 23. A legal action is a court proceeding whereby a person seeks to enforce a right, obtain compensation for a loss, or prevent a future wrong.

[4] Janice Tibbetts, "Courtroom Backlog Getting Worse: StatsCan" *Calgary Herald* (11 December 2004), A10. (ProQuest); Gary Dickson, "Legal System Courting Disaster..." *Calgary Herald* (9 March 2002), OS.07; Flemming, note 1, above.

[5] Thompson, note 3, above; Tibbetts, note 4, above; Flemming, note 1, above; Szklarski, note 1, above; Makin, note 3, above.

explain legal terms and procedures to self-represented persons,[6] which adds to the time and cost of court proceedings. Many other reasons, however, such as the adversarial nature of our justice system, the increasing complexity of certain types of cases, and a lack of resources, all contribute to delays.[7]

Although it doesn't receive the same amount of media attention, another phenomenon has links to both the cost of legal representation and delays in the civil justice system. This is the instance of the "vexatious litigant", someone who persistently and habitually engages in legal proceedings,[8] often against a large number of people, without having a legitimate claim requiring resolution.[9] Although we are not aware of his or her private motivations, the vexatious litigant may sue in order to annoy, harass, or financially punish other people. Many vexatious litigants also seem to exhibit behaviour consistent with some types of mental illness.[10]

Vexatious litigants can strain court resources. They can waste the time of judges and administrative staff and prevent other, legitimate claims from being dealt with. They can also force other people to incur otherwise unnecessary legal bills. Even if a claim seems without merit, the person against whom it is made must still file a defence, or risk losing the case by default. Although having committed no wrong, a person subject to vexatious litigation might also feel compelled to pay an amount in settlement of the claim, in order to avoid the expense and inconvenience of further proceedings.

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[6] For a general discussion about what types of information a judge might provide, see D.A. Rollie Thompson, "The Judge as Counsel" (Spring 2005) 8 News & Views on Civil Justice Reform 3.

[7] Tibbetts, note 4, above; Dickson, note 4, above; "Clogged Courts Waste Time and Money, Lamer Says" *Canadian Press* (20 April 1995), A14. (ProQuest); Peter Calamai, "Judicial Gridlock Costing Millions" *The Windsor Star* (10 April 1995), A11. (ProQuest).

[8] It is possible for a defendant to act in a vexatious fashion. See, for example, *Household Trust Co.* v. *Golden Horse Farms Inc.* (1992), 65 B.C.L.R. (2d) 355 (B.C.C.A.). Most commonly, though, one thinks of vexatious litigants as plaintiffs, people who begin a legal action. In the rest of this report, unless indicated otherwise, "vexatious litigant"means a plaintiff.

[9] *Webster's Ninth New Collegiate Dictionary* (Markham, Ont.: Thomas Allen & Son Ltd., 1991) at 1312 defines "vexatious" as "intended to harass." Vexatious litigation has also been referred to as "legal bullying" (Esther L. Lenkinski, Barbara Orser, & Alana Schwartz, "Legal Bullying, Abusive Litigation within Family Law Proceedings" 22 C.F.L.Q. 337) and vexatious litigants as "legal terrorists" (Tyler, note 4, above).

[10] Yves-Marie Morissette, "Abus de Droit, Quérulence et Parties Non Représentées" (2004) 49 McGill L.J. 23 at 27-30.

Although most vexatious litigants represent themselves, this Discussion Paper does not suggest there is a link between self-representation and vexatious litigation. Of course, not all self-represented litigants are vexatious. Being able to represent oneself is a fundamental part of our judicial system.[11] Rather, given the groundless and unreasonable nature of their claims, it should be difficult for most vexatious litigants to find a lawyer willing to represent them. Therefore, in most cases, a vexatious litigant will be self-represented. This Discussion Paper also does not suggest there is anything wrong in general with a litigant who pursues a legal claim with determination. However, to pursue tenaciously a claim that is obviously without merit would involve engaging in vexatious litigation.

In our society, access to justice is an important right, to be limited only in exceptional circumstances. The actions of vexatious litigants, however, are so extreme that in invoking their right to access justice, they may undermine the rights of others. In the words of Wakeling J.A., of the Saskatchewan Court of Appeal, a "...right to have whatever legally grounded dispute...duly considered and adjudicated by the courts...is not [a] right to continually require any party to spend time, effort and money in responding to a claim that has no legal foundation." [12]

2. Examples of vexatious litigation

The merit (or lack thereof) of each claim is unique, depending on the facts and how they relate to the applicable law. Nonetheless, factual summaries from a number of vexatious litigation cases can provide some idea of the behaviour of vexatious litigants, as well as the impact they may have on other people and on the civil justice system. In *Winkler* v. *Winkler*, for instance, the court pointed to the repetitive behaviour of a vexatious litigant:

> The litigation between Mr. and Mrs. Winkler has unfortunately fallen into a regular pattern. Mrs. Winkler brings custody, access and support claims (among others) before the court; these are unsuccessful, generally; costs are awarded against her which she cannot pay; she waits a period of time, and then brings the same matters back before the court.
>
> She does not allege, let alone prove, facts that demonstrate any change in circumstances between one application and the next. Her material (which on this

[11] See, for example, r. 9.08 of the Nova Scotia Civil Procedure Rules, which sets out the right to engage in legal proceedings in person or through a lawyer.

[12] *Saskatchewan Wheat Pool* v. *Kieling*, [1994] 6 W.W.R. 730 at 730 (Sask. C.A.).

> application totalled 367 pages of affidavit material, including exhibits) repeats the litany of complaints that she has had since day one.[13]

To illustrate what constitutes vexatious litigation, Webber J.A. in *Ayangma* v. *Prince Edward Island (Attorney General)* mentioned the procedural history of another case from Ontario, in which one party demonstrated a tendency to begin numerous, unnecessary actions:

> The Chavalis, who had amassed a substantial real estate portfolio, claimed their lawyer and their accountant defrauded them, causing them their financial problems. The Chavalis started a multiplicity of actions, 'often being four or five against the same person.' Numerous actions were taken against the mortgagee of the properties and personally against the lawyer who acted for the mortgagee, and several actions against the people who bought a residential property through a power of sale by mortgage. Four actions were taken against the court-appointed manager/receiver/trustee in respect of construction liens. These are only some of the Chavalis' actions.
>
> The *Chavalis* decision also noted a 'plethora of motions' and contraventions of undertakings. During a six week period six actions were dismissed but 'A near identical 66-page statement of claim to one of these dismissed actions was commenced ...' less than a month later. That action was then stayed as a patent abuse of the court's process. Further actions were commenced raising substantially the same issues as those that were previously dismissed. The Chavalis were found to have misrepresented facts to the Court. They brought court proceedings against more than twenty solicitors 'being either their own solicitors or solicitors who have represented parties whom the Chavalis have sued in respect of the loss of their real estate.' The court found that the Chavalis had instituted vexatious proceedings and conducted proceedings in a vexatious manner.[14]

In *Yorke* v. *Paskell-Mede*, the Quebec Superior Court summarized the unreasonable behaviour of a vexatious litigant:

> These actions in Superior Court are interrelated and share the same pattern: voluminous, inconsistent, incoherent, not to say preposterous allegations; disregard for the Superior Court by instituting but not pursuing Court proceedings against several of the persons impleaded; voluminous exhibits; reiteration of issues covering mostly the same grounds as before; extreme and unsubstantiated allegations; abuse of the process

[13] [1991] 2 W.W.R. 369 at 375 (Man. Q.B.).

[14] (2004), 238 Nfld. & P.E.I.R. 219 at 222-223 (P.E.I.S.C.A.D.).

> of law and harassing everyone and anyone connected or not, directly or indirectly, with the bankruptcy of Plaintiffs' business.[15]

These summaries illustrate a number of common features involving vexatious litigants. Their claims are often manifestly without merit. They may ignore procedural setbacks, including awards of costs[16] that are made against them. They may resort to multiple, unnecessary proceedings, often against the same person. They may sue anyone whom they perceive as an obstacle to their goals. Vexatious litigants also do not seem to care about the resources - on the part of themselves, other litigants or the public purse - depleted through their actions.

3. Inherent jurisdiction

Can't the courts prevent this type of behaviour from happening? Canadian courts do have various means at their disposal with which to control people and matters within their jurisdiction. Otherwise, it would be difficult to ensure the orderly administration of justice. For a superior jurisdiction court,[17] such as the Supreme Court of Nova Scotia, some of those powers are seen as included within the court's "inherent jurisdiction." The concept of inherent jurisdiction is an ancient one. It is part of the legal heritage which the Supreme Court of Nova Scotia received from England, where inherent jurisdiction has been associated with superior jurisdiction courts since their beginnings.[18] In *Halifax (Regional Municipality)* v. *Ofume*, Saunders, J.A., speaking for the Nova Scotia Court of Appeal, confirmed, "...jurisprudence in this country clearly establishes that Canadian courts of superior jurisdiction maintain a general inherent jurisdiction, which includes the discretion to control their own process."[19]

Inherent jurisdiction stems from the essential nature of a superior jurisdiction court. If it was not able to control its procedure and govern the actions of those who appear before it and who are subject to its orders, then the court's authority would quickly be undermined. In the words

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[15] [1996] R.J.Q. 1964 at 1968 (Que. Sup. Ct.)

[16] "In Canadian and English jurisdictions, the successful party in a court proceeding is entitled to recover certain court costs from the unsuccessful party as prescribed by statute or the Rules": Arthur J. Meagher & Ronald A. Meagher, *Civil Procedure Simplified* (Toronto: Butterworths, 1983) at 119.

[17] A superior court is a court which is not under the control of any other court except by appeal: Daphne A. Dukelow & Betsy Nurse, *The Dictionary of Canadian Law* (Scarborough, Ont.: Thomson Canada Ltd., 1991) at 1046-1047.

[18] I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 25-26.

[19] (2003), 218 N.S.R. (2d) 234 at 242 (N.S.C.A.).

of English procedural law authority I.H. Jacob, "the juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner."[20]

Although cautioning that the concept of inherent jurisdiction is "so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits,"[21] Jacob offered this definition:

> ...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.[22]

4. An important limitation

There is an important limitation to inherent jurisdiction as it applies to vexatious litigants. As Jacob explained, "the court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious."[23] In other words, a court may only apply its inherent jurisdiction to deal with a vexatious litigant once that person has commenced a legal proceeding, thereby bringing a matter to the court's attention. Fortunately, however, as section 5 of this Discussion Paper sets out, this gap in court powers can be remedied through legislation. In *Commonwealth Trading Bank* v. *Inglis*, the High Court of Australia took into account the reluctance of courts to proceed without specific legislative authority as being one indication that under English and Australian law, inherent jurisdiction does not empower courts to preclude a future legal action by a particular person:

> It is apparent that the courts, both in England and in this country, have declined to regard themselves as having power to do so, except where such power has been conferred upon them by an Act of Parliament or by rules promulgated under statutory authority. This is demonstrated, not merely by the absence of reported cases in which such orders have been made under the inherent power of the court, but by the fact that

[20] Jacob, note 18, above, at 27-28.

[21] Note 18, above, at 23.

[22] Note 18, above, at 51.

[23] Note 18, above, at 43. See also, for example, *Shaward* v. *Shaward* (1988), 3 W.W.R. 319 at 325 (Man. C.A.); *Midwest Property Management* v. *Moore* (2003), 341 A.R. 386 at 394 (Alta. Q.B.); *Dieppe (Town) et al.* v. *Charlebois et al.* (1995), 163 N.B.R. (2d) 394 at 398-400 (Q.B.); *Commonwealth Trading Bank* v. *Inglis* (1974), 131 C.L.R. 311 at 318 (H.C. Aus.).

> it has been thought necessary to deal with specific cases of the bringing of numerous unfounded proceedings by legislation rather than by invoking the inherent power of the court. There have been cases in which the vexatious character of the proceedings was so clear that it cannot be supposed that the court would have hesitated to exercise such a power if it had been regarded as existing.[24]

The little Nova Scotian case law available on this concept is consistent with the above-identified limitation on inherent jurisdiction. In *Re MacCulloch Estate*,[25] the Nova Scotia Court of Appeal considered the appropriateness of a trial-level decision which in part ordered the appellant not to bring further actions against certain defendants. The Court of Appeal noted that "[c]ounsel were unable to cite authority which would enable a trial judge to make such orders other than the general proposition that the court has the authority to control the conduct of its own proceedings."[26] Calling it a "drastic remedy" which should not be granted in that instance, namely where future information might become available on which the appellant could base a reasonable action, the Court of Appeal struck out those parts of the trial decision which prevented the appellant from taking future actions against other specified parties.[27] More recently, in *Ashby* v. *McDougall Estate*,[28] at issue in part was an application for an injunction[29] which would prevent the plaintiff from taking future legal action against certain named defendants unless the court provided leave. Summarizing the history of the proceedings between the parties, the court agreed "that the present action is vexatious and oppressive."[30] In particular, the plaintiff, whose legal actions had been found to be without merit on other occasions, "appears to refuse to accept the prior decisions made by Courts, and to accept anything less than a ruling in her favour."[31] Although acknowledging that "it is not fair that the defendant estate must pay legal counsel to continuously respond to the similar

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[24] *Commonwealth*, note 23, above, at 315. The first Australian vexatious litigant statute was enacted in the State of Victoria in 1928: *Commonwealth*, at 316.

[25] (1993), 123 N.S.R. (2d) 351 (N.S.C.A.)

[26] *MacCulloch Estate*, note 25, above, at 354.

[27] Note 25, above, at 354.

[28] 2005 NSSC 148.

[29] An injunction is a court order requiring someone to do something or to stop doing something.

[30] *Ashby*, note 28, above, at para. 88.

[31] Note 28, above, at para. 88.

claims from the same plaintiff," the court nonetheless held, "the defendants have not satisfied this court that jurisdiction exists to grant the requested injunction."[32]

In recent years, a few Canadian courts have made decisions implying that their traditional inherent jurisdiction, without the aid of a statute specifically empowering them to do so, does permit them to disallow vexatious litigants from commencing future legal actions. In *Yorke* v. *Paskell-Mede*,[33] the plaintiffs were declared vexatious litigants, and therefore not permitted to commence any future actions in the Quebec Superior Court without the court's leave. As part of its decision, the court relied on Jacob's article discussing inherent jurisdiction[34] and stated: "This jurisdiction include[s] 'in the case of an abuse of process, (the power for the Court) to stay or dismiss the action or impose terms as it thinks fit.'"[35] The court did not, however, refer to the conceptual gap, identified by Jacob, which has traditionally prevented courts from acting against vexatious litigants prior to an action being commenced.

In *Mazhero* v. *Yukon (Ombudsman & Privacy Commissioner)*, a 2001 decision,[36] the Yukon Territory Supreme Court relied on the result in *Yorke* in deciding that the Yukon court's inherent jurisdiction included the power to prevent abuse of process, even relating to the commencement of vexatious litigation. Nonetheless, the court went on to suggest that the Yukon legislature should enact legislation specifically empowering a court to deal with vexatious litigants before they commence a legal action.[37]

Outside Canada, in *Ebert* v. *Venvil*, a 2000 decision,[38] the English Court of Appeal found there was no reason, apart from legislation which stated otherwise, why the court's inherent jurisdiction should not include the power to prevent future actions being taken by certain people who have shown themselves to be vexatious litigants. Drawing an analogy to an injunction, the court reasoned that it should be able to protect a party from anticipated harm.

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[32] Note 28, above, at para. 89.

[33] *Yorke*, note 15 above.

[34] Note 18, above.

[35] Note 15, above, at 1969.

[36] 2001 YKSC 520. An appeal of this decision was dismissed (2002 YKCA 5), but for reasons unrelated to the issue of vexatious litigants.

[37] Note 36, above, at para. 47.

[38] [2000] Ch. 484 (C.A.).

Moreover, the court indicated that a broad approach should be taken to the nature of inherent jurisdiction.

Where does this leave us? At most, it might be suggested there is some case law support for expanding the concept of inherent jurisdiction to empower a court to prevent a known vexatious litigant from commencing an action. This would, however, be at odds with the traditionally-understood nature of inherent jurisdiction. There is no reported decision suggesting that Nova Scotia courts are amenable to a wider form of inherent jurisdiction, and in fact, existing case law suggests the contrary. Moreover, none of the three, non-Nova Scotian decisions (*Yorke*, *Mazhero*, *Ebert*) mentioned earlier in this section bind Nova Scotian courts. Although it is doubtful whether a vexatious litigant order could be granted on the basis of inherent jurisdiction, there is no question that such an order would be available if permitted through legislation which specifically grants courts the power to prevent known vexatious litigants from commencing any more actions. The next section examines such statutory measures which are in place elsewhere in Canada.

5. Canadian vexatious litigant provisions

Canadian vexatious litigants provisions have their roots in England, which enacted its first vexatious litigants statute in 1896.[39] The 1925 English statute,[40] which served as a model for an equivalent 1930 Ontario statute,[41] referred to a person who "has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings...." If an order was obtained against a person so that he or she could not commence legal proceedings in any court without leave (permission), that person would have to satisfy the court that a legal proceeding would not be an abuse of the court's process and that there would be a *prima facie* ground for the proceeding. The 1925 English statute made it clear that there would be an opportunity for a person potentially subject to an order to be heard. Interestingly, if because of poverty, that person would be unable to retain a lawyer, the court would engage legal counsel on that person's behalf. Distinct from the current Canadian approach, under the 1925

[39] *Vexatious Actions Act*, 1896 (U.K.) 59 & 60 Vict., c. 51.

[40] 1925 (15 & 16 Geo. 5) , c. 49, s. 51, which slightly amended the 1896 statute.

[41] Ontario first enacted a vexatious litigants statute, modelled after British legislation, in 1930: *Shaward*, note 23, above, at 321 (Man. C.A.). Although their histories of having vexatious litigant legislation are not nearly as long as Ontario's example, these provisions are well established in other Canadian jurisdictions. This type of provision dates back to 1975 in Alberta (S.A. 1975 (2nd), c. 43, s. 3 (5)), 1989 in B.C. (S.B.C. 1989, c. 40, s. 16) , 1990 in the Federal Courts (S.C. 1990, c. 8, s. 11), 1988 in Manitoba (S.M. 1988-89, c. 4, ss. 73-75), and 1987 in P.E.I. (S.P.E.I. 1987, c. 66, s. 61).

English statute the attorney general was required to apply for an order against a vexatious litigant.[42]

A number of Canadian provincial jurisdictions, namely Alberta, British Columbia (B.C.), Manitoba, Ontario, Quebec, Prince Edward Island (P.E.I.), and Saskatchewan, as well as a number of federally-created courts (the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada), have provisions which specifically authorize courts to deal with vexatious litigants.[43]

These provisions are summarized in the table attached to this Discussion Paper. Much similarity prevails among these provisions. The remainder of this section highlights the most significant features.[44]

a) Starting the process

In all instances, a challenge to a vexatious litigant is to be commenced by application (called a motion in Quebec and the Supreme Court of Canada).[45] None of the provisions provide any detail about the type of application or whether any particular notice requirements are involved. The B.C. provisions expressly state that any person may commence the application.

Apart from the Quebec rule, all of the provisions use the term "vexatious," which is not a defined term. The Quebec provision at article 84 refers instead to a person who "...acts in a quarrelsome manner, that is if that person exercises litigious rights in an excessive or unreasonable manner."

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[42] The current English vexatious litigant provisions are at s. 42 of the *Supreme Court Act 1981*, (U.K.), 1981, c. 54 (as amended).

[43] Alberta, *Judicature Act*, R.S.A. 2000, c. J-2, s. 23; British Columbia, *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 18; British Columbia, *Court of Appeal Act*, R.S.B.C. 1996, c. 77; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 40; Manitoba, *Court of Queen's Bench Act*, C.C.S.M. c. C280, ss. 73-75; Ontario, *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 140; PEI, *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, s. 61 ; Quebec, *Rules of Practice of the Superior Court of Quebec in Civil Matters*, RQ c. C-25, r. 8; Saskatchewan, *Queen's Bench Rules*, r. 662; Supreme Court of Canada, *Rules, Forms and Tariffs of the Supreme Court of Canada*, rr. 66-67.

[44] To avoid repetition, in this section, individual footnotes are not provided for specific features of vexatious litigant provisions, all of which cited at footnote 43. The reader who seeks more information is invited to view the Comparative Table at Appendix A.

[45] An application is a request that a judge make a ruling or take some other action.

b) Role of the Attorney General

In four out of the ten provisions identified (Alberta, Federal Courts, Manitoba, Saskatchewan), the relevant Attorney General must provide his or her consent to an application for a vexatious litigant order.[46] The Alberta provision specifies that the Attorney General's consent must be in writing.[47] The P.E.I. statute only states that notice of one's application must be given to the Attorney General. Provisions applicable respectively in the Federal Courts, Manitoba, Ontario, and P.E.I. expressly allow the Attorney General to be heard on an application for a vexatious litigant order, as well as on an application for lifting of such an order. Alberta's statute only mentions the Attorney General's entitlement to be heard in the context of a vexatious litigant order. In *Pawlus* v. *Pope*,[48] the Alberta Court of Appeal suggested that allowing the Attorney General to be heard provides him or her with an opportunity to present arguments as to the interpretation of the vexatious litigant provision and its effect, if any, on the court's inherent jurisdiction. Saskatchewan's vexatious litigant rule is the only one which specifically mentions the possibility of the Attorney General of that province bringing an application to obtain a vexatious litigant order.

c) Criteria for obtaining an order

The provisions share similar criteria for obtaining an order against a vexatious litigant,[49] though some notable differences do exist. Alberta, B.C., and Saskatchewan are the only jurisdictions which use the qualifier "habitually" in relation to the commencement of vexatious proceedings, while provisions applicable to the Federal Courts and the Supreme Court of Canada are the sole provisions which do not refer to unreasonableness as part of their criteria. Four of the ten provisions studied (Federal Courts, Manitoba, Ontario, P.E.I.) expressly empower the court both to prevent a vexatious proceeding from being commenced and to stop

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[46] The Saskatchewan rule requires the Attorney General's consent, or for the Attorney General to make the application. In calculating the number of provisions in this Paper, the B.C. provisions are counted as two, as they are found in two different statutes, each of which applies to a different court.

[47] Although the Federal Court and Manitoba provisions do not expressly require the Attorney General's consent to be in writing, as a matter of practice, this would likely be the case. For example, in *Henson* v. *Berkowits*, 2005 MBQB 32, it was noted at para. 22 that the Manitoba Attorney General filed with the court a written consent to the vexatious litigant application, but did not take part in the hearing of the matter.

[48] 2004 ABCA 396.

[49] In general, the statutes require each respective court to be satisfied that a person has persistently and without reasonable grounds commenced vexatious proceedings.

any ongoing vexatious litigation.[50] The Alberta, B.C. (Supreme Court), and Saskatchewan provisions specify that a court order might take into account vexatious legal proceedings against the same person or against different persons.

d) Scope of order

Under the Alberta, B.C. (Supreme Court), Ontario, and P.E.I. provisions, a vexatious litigant order prevents the subject from taking an action "in any court." This would include all courts which hear civil cases in each respective jurisdiction. For instance, the B.C. Supreme Court provision, in its criteria for an order, refers to "vexatious legal proceedings in the Supreme Court or in the Provincial Court." B.C.'s Provincial Court as part of its jurisdiction hears smaller claims matters, those involving amounts in dispute of $10,000 or less.[51]

e) Appeals of orders

An appeal is a court proceeding to set aside or vary a decision made by another court. Although this is not expressly set out in any of the respective vexatious litigant provisions, all Canadian courts (except for the Supreme Court of Canada, which serves as the final court of appeal in the country), which issue vexatious litigant orders allow those orders to be appealed.[52]

f) Leave to continue

If the application for a vexatious litigant order is successful, then the person subject to the order must obtain court leave, either to commence an action or (if the provision encompasses such a scenario) to continue with an ongoing one. The B.C., Quebec, and Saskatchewan provisions provide no criteria for the granting of court leave. In five of the provisions (Alberta, Federal Courts, Manitoba, Ontario, P.E.I.) the relevant standards are that the proceedings must not be an abuse of the process of the court, and there must be grounds for the proceedings (Alberta differs from the other five in not using the qualifier "reasonable" in relation to grounds).

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[50] This is implicit in the Quebec provision.

[51] Online: Provincial Court of British Columbia, "About the Court" <www.provincialcourt.bc.ca/aboutthecourt/index.html> (date accessed: 30 November 2005).

[52] See, for example, *Ayangma* v. *Prince Edward Island (Human Rights Commission)*, 2004 PESCAD 3; *S.* v. *S*, [1998] B.C.J. No. 2912 (B.C.C.A.) (QL); *Canada (Attorney General)* v.*Mishra*, [2000] F.C.J. No. 1734 (F.C.A.) (QL); *Law Society of Upper Canada* v. *Chavali*, [1998] O.J. No. 5344 (Ont. C.A.) (QL); *SMBD - Jewish General Hospital* v. *Saraffian*, [2004] J.Q. no. 12149 (Que. C.A.) (QL); *Lee* v. *Lee*, [1990] M.J. No. 627 (Man. C.A.) (QL); *Kieling*, note 12, above.

Four of the provisions studied (Federal Courts, Manitoba, Ontario, P.E.I.) expressly state that there is no appeal from a decision relating to an application for relief from a vexatious litigant order.[53] The other provisions are silent about appeals in this context or whether there are any limits on the number of times one might seek leave to proceed in spite of a vexatious litigant order.

g) Some distinctive aspects

The legislation in Manitoba, Ontario, and P.E.I. all expressly state that they do not diminish the court's authority to stay (halt) or dismiss a proceeding as an abuse of process or on any other ground. In other words, the inherent jurisdiction of superior jurisdiction courts in Manitoba, Ontario, and P.E.I. is not otherwise affected by their vexatious litigant provisions.

The Quebec provision includes a number of unique aspects. An order against a vexatious litigant, known as an "order of prohibition," may be general or limited to one or more judicial districts. It may apply to more than one person. Moreover, "[i]n an extreme case, the order of prohibition may include an order preventing the person from having access to the court-house." Finally, when an application is made to have a prohibition order lifted, no hearing is necessary.

The majority of vexatious litigant provisions apply to trial-level courts. Three provisions, applicable respectively in the B.C. Court of Appeal, the Federal Court of Appeal, and the Supreme Court of Canada, contemplate that vexatious litigation might occur at the appeal stage.

h) Built-in balance

With the exception of the Supreme Court of Canada rule, all vexatious litigant provisions allow a person who is subject to a vexatious litigant order to apply for court leave to lift the order. The provisions do not prevent people from commencing or continuing with a lawsuit, as long as they are able to show to the court before such action is commenced that there is a reasonable basis for making their claim in the courts. Stone J.A. of the Federal Court of Appeal has confirmed the balance built into the provisions applicable to the Federal Courts:

> The power conferred on the Court by subsection 40 (1) of the Act is, of course, most extraordinary, so much so that it must be exercised sparingly and with the greatest of

[53] In *Winkler* v. *Winkler*, [1994] M.J. No. 289 (QL) at para. 1, the Manitoba Court of Appeal held that the Manitoba provision, by its "plain wording," expressly denied a right of appeal of decision to deny leave.

> care. In a society such as ours, the subject is generally entitled to access the courts with a view of vindicating his or her rights. This concern was obviously in the mind of the legislators, seeing that some balance is built into section 40 by allowing proceedings to be instituted or continued with leave of the Court.[54]

Howland C.J.O., of the Ontario Court of Appeal summarized the nature of vexatious litigation statutes as follows:

> Vexatious proceedings legislation does not take away an individual's right to redress. Rather it provides that if an order is made against him under the legislation, he cannot seek redress until he has satisfied the proper authority that the proposed legal proceedings are not an abuse of process of the Court and there is prima facie ground for them.[55]

In similar fashion, the Federal Court of Appeal rejected as without merit an argument that the vexatious litigant provision applicable in the Federal Court was unconstitutional, depriving Canadians of access to the courts:

> An order under subsection 40(1) does not put an end to a legal claim or the right to pursue a legal claim. Subsection 40(1) applies only to litigants who have used unrestricted access to the courts in a manner that is vexatious (as that term is understood in law), and the only legal effect of an order under subsection 40(1) is to ensure that the claims of such litigants are pursued in an orderly fashion, under a greater degree of court supervision than applies to other litigants.[56]

6. Nova Scotian legislation & court rules

Nova Scotia does not have vexatious litigant legislation. In the widest sense, a 2003 private member's bill, *The Protection of Public Participation Act*,[57] did have some connection to vexatious

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[54] *R.* v. *Olympia Interiors Ltd.* (2004), 323 N.R. 191 at 193 (F.C.A.).

[55] *Foy* v. *Foy (No. 2)* (1979), 26 O.R. (2d) 220 at 225 (Ont. C.A.).

[56] *Canada (Attorney General)* v. *Mishra*, note 52, above, at para. 16 (F.C.A.). The Supreme Court of Canada has also recently declined to hear appeals arguing in part that vexatious litigant legislation is unconstitutional. See, for example, *Founder* v. *Canada (Minister of Canada Customs and Revenue Agency)* [2003] S.C.C.A. No. 442; *R.* v. *Nelson* [2004] S.C.C.A. No. 100.

[57] Bill 23, *An Act to Encourage Public Participation and Dissuade Persons from Bringing or Maintaining Legal Proceedings or Claims for an Improper Purpose and to Preserve Access to the Courts*, 3rd Sess., 58th General

litigants. The real aim of that proposed legislation, though, seemed to be to prevent certain people from launching groundless law suits in an effort to silence their public critics. It therefore seemed to focus on the phenomenon of "Strategic Litigation Against Public Participation" (SLAPP). Generally associated with litigation in the United States, SLAPP involves an attempt to silence critics through the threat of expensive, but perhaps baseless, proceedings in the courts.[58] Under the proposed Nova Scotian legislation, in order for a proceeding or claim to be considered brought or maintained for "an improper purpose," clause 2(2) required as a principal purpose an attempt to prevent a person from engaging in public participation, to divert that person's resources from public participation, or to penalize that person for engaging in public participation. At clause 2(1)(h), the Bill defined "public participation" as "communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the public or by any government body, in relation to an issue of public interest." Although in some respects this type of conduct could fall within the boundaries of what one might associate with vexatious litigation, vexatious litigation is generally understood to have a wider scope. A vexatious litigant might seek to harass or annoy, with no thought about whether "public participation" is in issue. Moreover, much civil litigation concerns private disputes and as such, has no connection to "an issue of public interest." In any event, the private member's Bill did not go beyond first reading.

The Nova Scotia Civil Procedure Rules include rule 14.25, whereby a court may strike out a pleading[59] in part on the ground that it is "false, scandalous, frivolous or vexatious," yet this rule does not preclude someone from commencing an action. The court's attention could only be drawn to the nature of a claim once it has been commenced and filed.[60] Rule 14.25 doesn't refer to a litigant's behaviour in court, nor does it prevent a litigant from relaunching the same action. The shortcomings of court rules which do not include a provision specifically focussed on vexatious litigants were summarized in *Ayangma*:

> In spite of courts striking out pleadings, ordering costs to be paid, rendering decisions against a litigant, the same litigant would come back again and again litigating the same

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Assembly, Nova Scotia, 2003.

[58] See Stephen Kimber, Dissent Silenced, [*Halifax*] *Daily News* (22 February 2004), 16 (ProQuest); Rick Howe, "Time to Help Out Digby Quarry Battle..." [*Halifax*] *Daily News* (31 October 2003), 23. (ProQuest).

[59] A pleading is a document in which a party to civil litigation sets out its position and responds to claims made by the other side.

[60] Referring to the Manitoba court rules in the same context, the Manitoba Court of Appeal in *Shaward*, note 23, above at 322, has stated, "[t]he pleading must be before the court before it can be struck out as vexatious."

matter either using the excessive litigation to attempt to force a party to pay compensation even though it had won at trial and appeal...or using the litigation as a means of intimidating others from making claims against them...In the circumstances faced by those courts, the remedies existing in the normal rules - striking out, security for costs, orders, etc. - would not stop the actions.[61]

7. Judicial treatment of vexatious litigation statutes

Given the similarity in legislative language, it is no surprise that Canadian courts seem to take a similar approach to the application of vexatious litigant provisions. Canadian courts agree that access to justice is a fundamental right in our society.[62] Restricting that right will only be done in exceptional circumstances.[63] As a result, whether to grant a vexatious litigant order is not an issue taken lightly, and courts will proceed with caution.[64]

Canadian courts have not identified a clear definition for the term "vexatious".[65] They seem to agree, though, that whether an action is vexatious is a matter to be determined by objective rather than subjective standards.[66] A frequently cited decision in this context is *Lang Mitchener/Johnston* v. *Fabian*, in which Henry J. reviewed a number of other relevant Ontario decisions and distilled a number of relevant principles:

(a) the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

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[61] *Ayangma*, note 14, above, at 232.

[62] See, for example *Mazhero* v. *Yukon (Human Rights Commission & Commissioners)* 2002 YKCA 5 at para. 12 (Yukon C.A.) ; *Olympia*, note 54, above, at 193; *Winkler*, note 13, above, at 374.

[63] *Midwest*, note 23, above, at 394 (Alta. Q.B.); *Winkler*, note 13, above, at 374; *Ayangma*, note 14, above, at 232-233.

[64] See *Household*, note 8, above, at 361; *Olympia*, note 54, above, at 193.

[65] *Foy* v. *Foy (No. 2)*, note 55, above, at 225-228 (Ont. C.A.).

[66] *Prince Edward Island* v. *Ayangma*, [1999] P.E.I.J. No. 30 (P.E.I.S.C.T.D.) (QL) at para. 12; *Henson* v. *Berkowits*, note 47, above, at para. 28.

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the Court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.[67]

Although Henry J's list is a comprehensive one, courts seem to concur that what may constitute vexatious behaviour is not a closed concept. It should not be overlooked that each factual situation is unique, and that in deciding whether to grant a vexatious litigant order, a judge will therefore have to take into account all relevant circumstances. For instance, in the family law context, in which situations might frequently change, a court will try to be flexible in considering variation claims being brought to court.[68]

8. Issues to consider

1. Should a vexatious litigants provision be adopted in Nova Scotia?

Is a vexatious litigants provision appropriate for Nova Scotia? The inherent jurisdiction of courts is both powerful and wide-ranging. Moreover, rules of court supplement those powers. Neither inherent jurisdiction, nor the current court rules seem to be adequate, however, to prevent vexatious litigants from starting groundless lawsuits, which are an unnecessary strain

[67] (1987), 59 O.R. (2d) 353 at 358-359 (Ont. H.C.).

[68] *Winkler*, note 13, above, at 375. The court in *Winkler* also noted, however (p.375) that "[o]n the other hand, domestic litigants should not be able with impunity to harass the other party, or bring repetitive motions before the court with little or no prospect of success, merely because they are *domestic* litigants.

on resources, both of the courts and of the people who are the subject of vexatious claims. In the words of Hall, J.A. of the British Columbia Court of Appeal, "[i]t is obviously of the utmost importance that there be unfettered access to the courts by citizens but I should think that a corollary of that is that continuing abuse of this most valuable and deeply enshrined democratic right should be dealt with decisively to preserve the rights of all."[69]

Taking into account the need to ensure access to the courts for all, as well as to prevent the abuse of the courts' process and the waste of time and money, the Commission is of the view that it would be appropriate to adopt a vexatious litigants provision in Nova Scotia. The provision would explicitly empower the courts to make an order against a vexatious litigant. The order would preclude a vexatious litigant from starting any new actions or continuing with an existing action until court leave was granted to lift the order. As in other Canadian jurisdictions which have put into place mechanisms to deal with vexatious litigants, a balanced approach should be used here, one which empowers the courts to deal effectively with vexatious litigants, but which also permits someone subject to a court order to seek court leave to have the order lifted where circumstances have changed.

As shown by the example of other Canadian jurisdictions, vexatious litigant provisions take one of two forms, legislation or court rules. Legislation is a written law adopted by a body of elected representatives, following a debate of the legislation's merits. Court rules govern proceedings in a particular court. In Nova Scotia, further to s. 46 of the *Judicature Act*,[70] the judges of the Supreme Court of Nova Scotia and of the Nova Scotia Court of Appeal create the Civil Procedure Rules, which apply to matters in those respective courts.

The Commission is of the view that a vexatious litigant provision should take the form of legislation. The merits of such a measure would be subjected to public debate and scrutiny in the House of Assembly. This is important, as some people may have concerns about how such a provision might affect the right of access to the courts. It will also enable the Government to fully explain the motivation behind such a provision, and in particular, how it attempts to balance the rights of all. As discussed earlier, at Section 4, there is also considerable doubt about whether a Nova Scotian court would be able, on the basis of inherent jurisdiction alone, to prevent a known vexatious litigant from commencing a legal action in that court.

Although of the view that a vexatious litigants provision should take the form of legislation, the Commission wishes to avoid any misunderstanding that the adoption of that measure would somehow mean a reduction in the courts' other powers, and in particular, the scope of

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[69] *S. (M.)* v. *S. (P. I.)*, (1998), 115 B.C.A.C. 146 (B.C.C.A.).

[70] R.S.N.S. 1989, c. 240.

their inherent jurisdiction. The Commission therefore suggests that the proposed legislation would clearly indicate it is meant to be cumulative in relation to other remedies, and that it would not derogate from the courts' current powers.

The majority of vexatious litigant provisions apply to trial-level courts. Those provisions exist to prevent people from commencing vexatious legal actions or once begun, conducting those actions in a vexatious manner. Once a trial ends and a court provides its decision, there is no guarantee, however, that a vexatious litigant, if disappointed by the result, will let the matter drop. Rather, a vexatious litigant might simply carry on with his or her improper behaviour, but at the appeal stage. Recognizing this, the Supreme Court of Canada, which serves as a final court of appeal for the entire country, in 1996, created a two-part vexatious litigants provision.[71] Where a judge is satisfied that a party is conducting a Supreme Court of Canada proceeding in a vexatious manner, the judge is empowered to order a stay of proceedings on appropriate terms. Under the second part of the provision, a judge may order that no further documents be filed relating to an application for which leave to appeal has been dismissed, if the judge is satisfied that the filing of further documents would be vexatious or made for an improper purpose. A published commentary on this provision suggested that "the Court occasionally attracts the attention of vexatious litigants who bombard the Registry with motions and requests," and that the provision was meant to allow the court "to protect its processes and to conserve judicial resources."[72]

Taking the Supreme Court of Canada provision into account, as well as vexatious litigant provisions applicable in the B.C. Court of Appeal and the Federal Court of Appeal, the Commission is of the view that vexatious litigants can pose the same difficulties at the appeal level as they can at the trial level. As a result, the Commission suggests that a vexatious litigant provision should apply to both the Supreme Court of Nova Scotia and where relevant to the Nova Scotia Court of Appeal.

Furthermore, as a matter of consistency and thoroughness, the Commission takes the position that a vexatious litigants rule should apply to all Nova Scotian courts with civil jurisdiction. This would include the Small Claims Court of Nova Scotia. The Commission is not suggesting that Small Claims Court adjudicators, who are practicing lawyers, rather than judges,[73] would be empowered to make vexatious litigant orders. Instead, consistent with the approach in the majority of Canadian jurisdictions which allow for vexatious litigant orders, the Nova Scotia

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[71] Supreme Court Rules, note 43, above.

[72] Brian A. Crane & Henry S. Brown, *Supreme Court of Canada Practice 2002* (Scarborough, Ont.: Carswell, 2002) at 342.

[73] *Small Claims Court Act*, R.S.N.S. 1989, s. 6.

Supreme Court would make such an order, the scope of which could include Small Claims Court matters. At the moment, though, the Commission does not have a clear perspective on whether vexatious litigants pose a significant problem in Small Claims. As a result, the Commission invites comments about whether the Small Claims Court should be included in any vexatious litigants provision.

The Commission suggests:

- A vexatious litigants provision should be adopted in Nova Scotia.
- The provision would explicitly empower the courts to make an order against a vexatious litigant. The order would preclude a vexatious litigant from starting any new actions or continuing with an existing action until court leave was granted to lift the order.
- The provision should take a balanced approach, empowering the courts to deal effectively with vexatious litigants, but also permitting someone subject to such an order to seek court leave to have the order lifted.
- The vexatious litigants provision should take the form of legislation.
- The legislation would make it clear it is meant to be cumulative in relation to other remedies, and that it would not derogate from the courts' current powers.
- The vexatious litigants provision should apply to both the Supreme Court of Nova Scotia and where relevant, the Nova Scotia Court of Appeal.
- A vexatious litigants provision should apply to all Nova Scotian courts with civil jurisdiction.

The Commission invites comments:

- On whether a vexatious litigants provision should apply to the Small Claims Court of Nova Scotia.

2. Should the term "vexatious" be defined?

All Canadian jurisdictions, with the exception of Quebec,[74] which have vexatious litigant provisions use the term "vexatious," but do not define it. In most of those jurisdictions, pursuing a legal action without any reasonable ground is part of what makes up a vexatious proceeding. This doesn't, however, bring us any closer to what is meant by the term "vexatious." If "without any reasonable ground" and vexatious were synonymous, then one would be unnecessary if both were used to describe a litigant's vexatious behaviour. It is, though, a principle of statutory interpretation that a legislature will be assumed not to have created any redundancies.[75] In *Foy* v. *Foy (No. 2)*, the Ontario Court of Appeal, specifically considering the meaning of "vexatious" in Ontario legislation, but also keeping in mind its use in England, concluded that it was not clearly defined.[76]

As one possibility, rather than attempting a statutory definition for "vexatious," which in any event would have to remain rather general in nature, the Commission thinks it could be more helpful to include, as part of a vexatious litigants provision, a non-exclusive list of factors which a court could take into account in determining whether a litigant's conduct is vexatious. In addition to serving as a guide to courts, the list could provide direction to parties involved in litigation. A modified version of Henry J's list of relevant factors in *Lang/Michener* could form the basis of the list:

Examples of vexatious behaviour by a person in the context of court proceedings may include the following:

1) bringing one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

2) bringing an action which cannot succeed, which would lead to no possible good, or which has no reasonable expectation of providing relief;

3) bringing an action for an improper purpose, including the harassment and oppression of other parties;

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[74] Quebec uses instead the standard of someone acting "in a quarrelsome manner, that is if that person exercises rights in an excessive or unreasonable manner."

[75] *Ayangma*, note 66, above, at para. 12.

[76] Note 55, above.

4) inappropriately using previously-raised grounds and issues in subsequent actions;[77]

5) a pattern of failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

6) persistently taking unsuccessful appeals from judicial decisions.

To the above list, the Commission thinks it is important to add a factor which would address a litigant's inappropriate behaviour in court. The Commission suggests the following:

"7) persistently engaging in inappropriate courtroom behaviour, such as being disrespectful to the court, failing to observe rulings and directions from the presiding judge, or engaging in unnecessarily protracted submissions."

Another possibility, based upon the approach in a number of American statutes,[78] is to suggest that one could be declared a vexatious litigant upon the satisfaction of precise, numerical criteria. For example, under Florida law, a vexatious litigant may be defined as someone who has unsuccessfully taken, on his or her own, 5 or more civil actions in any Florida state court (except for small claims) over the immediately preceding 5 years.[79] If found to be a vexatious litigant in that fashion, one would then have to post suitable security in order to continue with an action.[80]

The Commission has not yet taken a position on this issue and invites comment on what approach, or combination of approaches, would work best in Nova Scotia.

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[77] The Commission has added the qualifier, "inappropriately," to this example.

[78] The American states of California, Florida, Hawaii, Ohio, and Texas have legislation dealing with vexatious litigants. Of those statutes, only the Ohio law does not identify a certain number of failed actions within a set time as one means of deeming someone a vexatious litigant. See Lee W. Rawles, "The California Vexatious Litigant Statute..." (1998-99) 72 S. Cal. L. Rev. 275; Deborah L. Neveils, "Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?" (2000-2001) 25 Nova L. Rev. 343.

[79] The full text of this portion of the Florida vexatious litigants law is reproduced at Appendix B.

[80] Florida law also includes the possibility of "prefiling orders," whereby the court or a person could apply to have someone declared a vexatious litigant before that person began a new action. See s. 68.093(4) of the Florida Civil Practice and Procedure statute, available online at: <www.leg.state.fl.us>, under the "Statutes, Constitution, & Laws of Florida" link (date accessed 2 December, 2005).

The Commission suggests:

- Rather than attempting to define the term "vexatious" or to use a substitute, a vexatious litigants provision could include a non-exclusive list of factors which could help to guide the court.

Examples of vexatious behaviour by a person in the context of court proceedings may include the following:

1) bringing one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
2) bringing an action which cannot succeed, which would lead to no possible good, or which has no reasonable expectation of providing relief;
3) bringing an action for an improper purpose, including the harassment and oppression of other parties;
4) inappropriately using previously-raised grounds and issues in subsequent actions;
5) a pattern of failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
6) persistently taking unsuccessful appeals from judicial decisions.
7) persistently engaging in inappropriate courtroom behaviour, such as being disrespectful to the court, failing to observe rulings and directions from the presiding judge, or engaging in unnecessarily protracted submissions.

- Another possibility would be to adopt precise, numerical criteria in order to decide who is a vexatious litigant.

The Commission invites comment:

- On what approach, or combination of approaches, would work best in Nova Scotia.

3. Should there be a specifically mentioned role for the Attorney General?

If not involved in a legal proceeding, the Attorney General could be in the position, as an objective third party, to bring to the court's attention information about the purpose of a vexatious litigants provision. In that fashion, the Attorney General would be acting in the public interest. For this reason, the Commission agrees that a vexatious litigant provision should require notice to the Attorney General of any application for a vexatious litigant order and would allow the Attorney General to appear at a hearing of that application. The provision should also make it clear that unless applying for a vexatious litigant order, the Attorney General's role would be an impartial one, to represent the interests of the public. Consistent with that theme, the Commission is not in favour of requiring the Attorney General's consent for such an application to be made, which may signal an undue, and even partisan, involvement.

The Commission suggests:

- A vexatious litigant provision should require notice to be provided to the Attorney General of an application for a vexatious litigant order.
- The Attorney General would also be entitled to appear at the hearing of the application.
- An application for a vexatious litigant order would not require the Attorney General's consent.
- The legislation should make it clear that unless applying for a vexatious litigant order, the Attorney General's role would not be a partisan one.

4. Challenges to a vexatious litigant order.

Apart from the Supreme Court of Canada, which serves as the final court of appeal for the entire country, all Canadian jurisdictions which issue vexatious litigant orders allow those orders to be appealed. An appeal is a court proceeding to set aside or vary a decision made by another court. This enables the subject of an order to challenge it, if he or she thinks the order was made unfairly or on improper grounds. The Commission agrees with this approach and suggests that a vexatious litigant provision in Nova Scotia should allow for an appeal of the granting of an order.

Once a vexatious litigant order has been made, all Canadian jurisdictions permit the subject of the order to apply to the court for leave to continue, in other words, for the order to be lifted. It is different from an appeal, in that the applicant is not suggesting that the order was flawed. Rather, the leave provision is meant to allow an applicant to bring to light details not available or in existence when the order was granted. It also permits a person to attempt to convince a court why an action should continue, despite the existence of an order. If a leave to continue application is unsuccessful, four jurisdictions (Federal Courts, Manitoba, Ontario, P.E.I.) expressly preclude that decision from being appealed. In the interest of trying to reduce the effect of vexatious litigants on the judicial system, the Commission is of the view that there should be no appeal of an unsuccessful application for leave to continue in spite of a vexatious litigant order. Instead, an unsuccessful applicant would be entitled to seek leave once again to continue should relevant circumstances change.

The Commission acknowledges that there is potential for some persons to abuse the leave provision, by bringing numerous unsuccessful leave applications, perhaps after having only tinkered with the substance of their claim. The Commission does not wish to transfer a problem from an early point in the litigation process to a later stage. As a result, the Commission suggests that courts should be given an express, rule-making power to determine how a leave application should take place, including any limits on the frequency of such applications. The Commission also invites comments on whether any other measures should be proposed to help prevent procedural abuse at this stage.

The Commission suggests:

- One should be able to appeal a vexatious litigant order.
- One should not, however, be able to appeal an unsuccessful application for leave to continue in spite of a vexatious litigant order.
- Courts should be given an express rule-making power to determine how a leave application should take place, including any limits on the frequency of such applications.

The Commission invites comment:

- On whether any other measures should be proposed to help prevent procedural abuse from occurring at this stage.

5. New and existing actions

In addition to preventing a vexatious litigant from starting a new action, one might wish to curtail a litigant who originally had a reasonable cause of action, but who then pursues that action in a vexatious fashion. For instance, that person might insist on pursuing numerous, unnecessary, preliminary matters. It should also not be overlooked that a defendant might also conduct proceedings in a vexatious manner. To limit such behaviour, a number of vexatious litigant provisions specifically permit courts to deal with both new and continuing proceedings. The Commission agrees with this approach.

In *Foy* v. *Foy*, the Ontario Court of Appeal, in examining an earlier version of the Ontario legislation, held that to encompass both new and continuing actions, a vexatious litigant provision had to do so clearly . More particularly, a former version of the Ontario legislation, which referred to someone who "instituted" vexatious legal proceedings, was held not to include interlocutory proceedings (those taking place after commencement of an action) and appeals.[81] The Ontario provision was subsequently amended and now refers both to "instituted vexatious proceedings in any court," as well as a person who "conducted a proceeding in any court in a vexatious manner."[82] The Commission therefore also recommends that particular attention be paid to the language of any proposed vexatious litigant provision, to ensure that it clearly contemplates new and continuing proceedings.

The Commission suggests:

- A vexatious litigant provision should specifically and clearly permit courts to deal with both new and continuing proceedings.

6. The vexatious spokesperson

Related to the phenomenon of the vexatious litigant is that of the vexatious spokesperson or agent. This involves litigation carried on in a vexatious fashion by a person without legal training,[83] such as a friend or family member, on someone else's behalf. If the spokesperson

[81] Note 55, above, at 230-233.

[82] Ontario, *Courts of Justice Act*, note 43, above, s. 140.

[83] The Commission does not have in mind here lawyers, the essence of whose profession involves representing other people in legal matters. Unlike non-lawyers, lawyers must adhere to professional standards of conduct, and are subject to discipline if they do not respect those standards.

conducts a reasonable claim in a vexatious manner, this might be a matter of a difficult personality, or perhaps the representative bears a grudge against the other party in proceedings. The representative might also convince other people to allow him or her to begin groundless legal actions on their behalf.

If not phrased widely enough, a vexatious litigant provision might not encompass the actions of a vexatious spokesperson. For instance, under the Alberta provision, "the Court may order that no legal proceedings shall, without leave of the Court, be instituted in any court by the person taking those vexatious legal proceedings."[84] The order seems to apply to the person in whose name the proceedings are undertaken, rather than to any representative.

The courts do have the authority to deal with the conduct of an agent who comes before the court. Specifically, there is no right to be represented by an agent without court approval. The Nova Scotia Supreme Court has, for example, "the discretion to control its own process by, among other things, allowing or excluding lay persons from representing parties before the court."[85] This would not solve the problem, however, of a spokesperson who uses inappropriate methods to represent a series of people, in essence acting as a serial vexatious agent, either convincing other people to begin meritless actions or jeopardizing a reasonable claim through his or her objectionable behaviour. If a court makes an order because of an agent's behaviour in relation to one proceeding, there is no guarantee that the agent may not try again in any other action. The Commission suggests that the language used in a vexatious litigant provision should include vexatious spokespersons or agents. More specifically the Commission suggests that a vexatious litigant provision should empower the courts to make an order against a vexatious agent based on his or her cumulative history of commencing or conducting vexatious proceedings.

The Commission suggests:

- The language used in a vexatious litigant provision should include vexatious spokespersons or agents. More specifically, the provision should empower the courts to make an order against a vexatious agent based upon his or her cumulative history of commencing or conducting vexatious proceedings.

[84] Alberta, *Judicature Act*, note 43, above, s. 23.

[85] *Ofume*, note 19, above at 243.

LIST OF PROPOSALS

1. A vexatious litigants provision should be adopted in Nova Scotia.[pp. 18-21]

2. The provision would explicitly empower the courts to make an order against a vexatious litigant. The order would preclude a vexatious litigant from starting any new actions or continuing with an existing action until court leave was granted to lift the order. [pp. 18-21]

3. The provision should take a balanced approach, empowering the courts to deal effectively with vexatious litigants, but also permitting someone subject to such an order to seek court leave to have the order lifted. [pp.18-21]

4. The vexatious litigants provision should take the form of legislation. [pp.18-21]

5. The legislation would make it clear it is meant to be cumulative in relation to other remedies, and that it would not derogate from the courts' current powers. [pp.18-21]

6. The vexatious litigants provision should apply to both the Supreme Court of Nova Scotia and where relevant, the Nova Scotia Court of Appeal. [pp. 18-21]

7. A vexatious litigants provision should apply to all Nova Scotian courts with civil jurisdiction. [pp.18-21]

8. Rather than attempting to define the term "vexatious" or to use a substitute, a vexatious litigants provision could include a non-exclusive list of factors which could help to guide the court. [pp.22-24]

9. Examples of vexatious behaviour by a person in the context of court proceedings may include the following: [pp. 22-24]

    1) bringing one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
    2) bringing an action which cannot succeed, which would lead to no possible good, or which has no reasonable expectation of providing relief;
    3) bringing an action for an improper purpose, including the harassment and oppression of other parties;
    4) inappropriately using previously-raised grounds and issues in subsequent actions;
    5) a pattern of failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

6) persistently taking unsuccessful appeals from judicial decisions.
7) persistently engaging in inappropriate courtroom behaviour, such as being disrespectful to the court, failing to observe rulings and directions from the presiding judge, or engaging in unnecessarily protracted submissions.

10. Another possibility would be to adopt precise, numerical criteria in order to decide who is a vexatious litigant. [pp. 22-24]

11. A vexatious litigant provision should require notice to be provided to the Attorney General of an application for a vexatious litigant order. [p. 25]

12. The Attorney General would also be entitled to appear at the hearing of the application. [p.25]

13. An application for a vexatious litigant order would not require the Attorney General's consent. [p. 25]

14. The legislation should make it clear that unless applying for a vexatious litigant order, the Attorney General's role would not be a partisan one. [p. 25]

15. One should be able to appeal a vexatious litigant order. [pp.25-26]

16. One should not, however, be able to appeal an unsuccessful application for leave to continue in spite of a vexatious litigant order. [pp. 25-26]

17. Courts should be given an express rule-making power to determine how a leave application should take place, including any limits on the frequency of such applications. [pp. 25-26]

18. A vexatious litigant provision should specifically and clearly permit courts to deal with both new and continuing proceedings. [p. 27]

19. The language used in a vexatious litigant provision should include vexatious spokespersons or agents. More specifically, the provision should empower the courts to make an order against a vexatious agent based upon his or her cumulative history of commencing or conducting vexatious proceedings. [pp. 27-28]

THE COMMISSION INVITES COMMENTS:

- On whether a vexatious litigants provision should apply to the Small Claims Court of Nova Scotia. [pp. 18-21]

- On what approach, or combination of approaches to defining a vexatious litigant would work best in Nova Scotia. [pp. 22-24]

- On whether any other measures should be proposed to help prevent further abuses of process by a vexatious litigant seeking to have an order lifted. [pp. 25-26]

APPENDIX A
Comparative Tables

VEXATIOUS LITIGANTS
COMPARATIVE TABLE
(Portion of table left blank if no relevant provision)

	How Challenge Made	Involvement of Attorney General (AG)	Criteria For Order	Consequences of Successful Application	How to Obtain Leave to Continue	Appeal of Order Refusing Leave	Court's Authority Otherwise Unaffected
Alberta (Judicature Act, RSA 2000, c. J-2, s.23)	Application made by way of originating notice to Court of Queen's Bench	• consent in writing required from Minister of Justice and Attorney General of Alberta • AG with right to appear and be heard on the application for an order	Court satisfied "that a person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings in the court or in any other court against the same person or against different persons".	The Court may order that no legal proceedings shall, without leave of the Court, be instituted in any court by the person taking the vexatious legal proceedings.	Leave to continue with a proceeding may be granted where "the Court is satisfied that the proceedings are not an abuse of the process of the Court and that there is on its face ground for the proceedings"		
British Columbia (Supreme Court Act, RSBC 1996, c.443, s.18)	On application by any person to the Supreme Court of British Columbia		Court satisfied "that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons."	"The Court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the Court, be instituted by that person in any court."			
British Columbia (Court of Appeal Act, RSBC 1996, c. 77)	On application to the B.C. Court of Appeal - by any person.		A justice satisfied "that a person has habitually, persistently and without reasonable cause commenced vexatious proceedings in the court."	Justice "may, after hearing that person or giving that person an opportunity to be heard, order that proceedings must not be brought or commenced in the court without leave of a justice."			

	How Challenge Made	Involvement of AG	Criteria For Order	Consequences of Successful Application	How to Obtain Leave to Continue	Appeal of Order Refusing Leave	Court's Authority Otherwise Unaffected
Federal Court of Canada (Federal Courts Act, RSC 1985, c. F-7, s.40)	On application before the Federal Court of Appeal or the Federal Court	• Application for vexatious litigant order only with consent of Attorney General of Canada. • AG entitled to be heard on the application for an order, as well as on application for rescission* or leave	Court satisfied "that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner"	Court "may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court."	A person against whom an order has been made may apply to the court for rescission of the order or for leave to institute or continue a proceeding. The Court may grant leave if it is satisfied "that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding."	The Court's decision relating to leave to institute or continue a proceeding is final and not subject to appeal.	
Manitoba (Court of Queen's Bench Act, CCSM c. C280, ss. 73-75)	On application to a judge of the Court of Queen's Bench	• Consent of Attorney General required for application for vexatious litigant order. • AG entitled to be heard on the application for an order, as well as an application for rescission or leave. • Person applying for leave to proceed must give notice to AG.	Judge satisfied "that a person, persistently and without reasonable grounds, is instituting vexatious proceedings in the court or conducting a proceeding in a vexatious manner."	The judge may order that the person shall not institute a further proceeding or a proceeding instituted by the person not be continued, except with leave of a judge.	A person subject to an order may apply for leave to institute or continue the proceeding, or rescission of the order, "and for no other relief, including costs." The judge must be satisfied that "a proceeding to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding."	No appeal lies from a refusal to grant leave to proceed or rescission.	"Nothing in this Part limits the authority of the court to stay or dismiss a proceeding as an abuse of process or on any other ground."
Ontario (Courts of Justice Act, RSO 1990, c. C.43, s. 140)	Application to the Superior Court of Justice	Attorney General entitled to be heard on an application for leave or rescission	Judge satisfied "that a person has persistently and without reasonable grounds, instituted vexatious proceedings in any court, or conducted a proceeding in any court in a vexatious manner."	The judge may order that no further proceeding be instituted by the person in any court, or a proceeding previously instituted by the person in any court not be continued, except by leave of a judge of the Superior Court of Justice.	Leave to proceed "shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding." Apart from rescission of the order made, a person may not seek any other relief on the application.	No appeal lies from a refusal to grant relief to the applicant.	"Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground."

* Rescinding an order (noun "rescission") is to repeal it.

P.E.I. (Supreme Court Act, RSPEI 1988, c. S-10, s. 61)	**How Challenge Made** Application to a judge of the Supreme Court	**Involvement of AG** • Application for a vexatious litigant order shall be made only on notice to the Attorney General, who is entitled to be heard on the application. • AG also entitled to be heard on an application for leave or rescission.	**Criteria For Order** Judge satisfied "that a person has persistently and without reasonable grounds instituted vexatious proceedings in any court, or conducted a proceeding in any court in a vexatious manner."	**Consequences of Successful Application** The judge may order that no further proceeding be instituted by the person in any court, or a proceeding previously instituted by the person in any court not be continued, except by leave of a judge of the Supreme Court.	**How to Obtain Leave to Continue** • Leave to proceed shall be granted "only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding." • Apart from seeking rescission of the order made, the person making the application may not seek any other relief on the application.	**Appeal of Order Refusing Leave** No appeal lies from refusal to grant relief to the applicant.	**Court's Authority Otherwise Unaffected** "Nothing in this section limits the authority of a cou to stay or dismiss a proceeding as an abuse of process or on any other ground."
Quebec (Rules of Practice of the Superior Court of Quebec in Civil Matters, art. 84-86)	By motion (not specifically mentioned)		Person acting "in a quarrelsome manner, that is if that person exercises litigious rights in an excessive or unreasonable manner."	The Court may prohibit that person from instituting an action or an application without first having obtained prior judicial authorization. Order may be general or limited to one or more judicial districts, or with respect to one or more persons. Order may prevent person from having access to a courthouse.	• By application to Chief Justice of the Superior Court or a designate. • Hearing not necessary.		
Saskatchewan (Queen's Bench Rules, r.662)	Application to the Court of Queen's Bench	Application to be by or with the consent in writing of the Attorney General	Court satisfied "that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings against the same person or against different persons."	• "Court may order that no proceedings shall, without leave of the Court, be instituted in the Court of Queen's Bench by such person." • Court may require that the local registrar at each judicial centre be notified of such order.			

Supreme Court of Canada (Rules, Forms and Tariffs of the Supreme Court of Canada, rr. 66-67)	**How Challenge Made** By motion	**Involvement of AG**	**Criteria For Order** • Judge satisfied "that a party is conducting a proceeding in a vexatious manner." • Judge satisfied that the filing by a party of further documents relating to an application for leave to appeal which has been dismissed would be vexatious or made for an improper purpose.	**Consequences of Successful Application** • Judge may order that the proceeding be stayed, on terms the judge considers appropriate. • Judge may order that no further documents be filed relating to an application for leave which has been dismissed.	**How to Obtain Leave to Continue**	**Appeal of Order Refusing Leave**	**Court's Authority Otherwise Unaffected**

APPENDIX B

Excerpt From Florida Statute

(Excerpt from)

68.093 Florida Vexatious Litigant Law.--

(1) This section may be cited as the "Florida Vexatious Litigant Law."

(2) As used in section, the term:

(a) "Action" means a civil action governed by the Florida Rules of Civil Procedure and proceedings governed by the Florida Probate Rules, but does not include actions concerning family law matters governed by the Florida Family Law Rules of Procedure or any action in which the Florida Small Claims Rules apply.

(b) "Defendant" means any person or entity, including a corporation, association, partnership, firm, or governmental entity, against whom an action is or was commenced or is sought to be commenced.

(c) "Security" means an undertaking by a vexatious litigant to ensure payment to a defendant in an amount reasonably sufficient to cover the defendant's anticipated, reasonable expenses of litigation, including attorney's fees and taxable costs.

(d) "Vexatious litigant" means:

1. A person as defined in s. 1.01(3) who, in the immediately preceding 5-year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity; or

2. Any person or entity previously found to be a vexatious litigant pursuant to this section.

An action is not deemed to be "finally and adversely determined" if an appeal in that action is pending. If an action has been commenced on behalf of a party by an attorney licensed to practice law in this state, that action is not deemed to be pro se even if the attorney later withdraws from the representation and the party does not retain new counsel.

. . .